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In the Supreme Court of the United States

OCTOBER TERM, 1992

TEXAS WATER CONSERVATION ASSOCIATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

SABINE RIVER AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an environmental assessment prepared by the United States Fish and Wildlife Service in conjunction with its decision to accept a donated non-development easement to preserve a bottomland hardwood waterfowl habitat properly concluded that a full environmental impact statement was not required because the acceptance of an easement to preserve the existing physical environment would not "significantly affec[t] the quality of the human environment" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether documents generally identifying regional bottomland hardwood sites and outlining possible methods for their preservation constituted "proposals for * * * major Federal actions" subject to the environmental impact assessment provisions of Section 102(2)(C) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (SRA Pet. App. 1a-23a) is reported at 951 F.2d 669. The opinion of the district court (SRA Pet. App. 24a-54a) is reported at 745 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. A petition for rehearing was denied on

March 4, 1992 (SRA Pet. App. 55a-56a). The petition for a writ of certiorari was filed on June 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires that every federal agency include a detailed statement of environmental consequences (known as an environmental impact statement or EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C); SRA Pet. App. 58a-59a. The agency's responsibility to prepare an EIS is keyed to its making a "recommendation or report" on an actual "*proposal* for federal action," not merely "the contemplation of a project and the accompanying study thereof." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in original), quoting *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1975).

Because it is not always clear from the start whether a proposed federal action will "significantly affec[t] the quality of the human environment" within the meaning of the statute, the Council on Environmental Quality established by NEPA (42 U.S.C. 4341 *et seq.*) has issued regulations (40 C.F.R. 1500.1 *et seq.*) under which an agency may first prepare an "environmental assessment," a "concise" document that will "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS and "[a]id an agency's compliance with [NEPA] when no [EIS] is necessary." 40 C.F.R. 1501.4(b), 1508.9; see SRA Pet. App. 88a. If, based on the environmental assessment, the agency determines that a full EIS is not required, it will issue a "finding of no

significant impact" (FONSI) to that effect. 40 C.F.R. 1501.4(e).

2. a. Congress has directed the Secretary of the Interior to acquire interests in wetlands in order to conserve migratory waterfowl. See, *e.g.*, Migratory Bird Conservation Act, ch. 257, 45 Stat. 1222, 16 U.S.C. 715 *et seq.*; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee; Migratory Bird Hunting Stamp Act, ch. 71, 48 Stat. 452, 16 U.S.C. 718 *et seq.*; Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582, 16 U.S.C. 3901 *et seq.* See generally *North Dakota* v. *United States*, 460 U.S. 300 (1983). Lands acquired pursuant to these directives are administered by the United States Fish and Wildlife Service (FWS) as components of the National Wildlife Refuge System. 16 U.S.C. 668dd.

The FWS has implemented a Migratory Bird Program that includes the preparation of regional studies describing and identifying migratory bird habitats. In 1983, an FWS biological survey identified as particularly valuable waterfowl habitats certain bottomland hardwood areas in eastern Texas, including land owned by the private Little Sandy Hunting and Fishing Club (Club) (SRA Pet. App. 41a; A.R. Item A, Sec. IV, at 1-6). The FWS compiled the survey results and other available information into a document (A.R. Item B) titled "Concept Plan: Texas Bottomland Hardwood Preservation Program Plan," issued in final form in May 1985.

The Concept Plan was intended to "identify and seek methods for preserving" bottomland sites (A.R. Item B, at 4), but noted that "[a] stated acreage and policy objective for bottomlands in Texas is very difficult because of the infancy of the program and complexity of biological and sociological factors involved." *Id.* at 20. It ranked identified sites into six preliminary priority categories, the highest of which included the Middle Sabine River

Bottom where the Club lands are located, *id.* at 23, but stated that "[n]o specific sites are presently targeted for action, and additional sites may be added to the list at a future date." *Id.* at 11. At the time, "[a] minimal amount of landowner information ha[d] been acquired." *Id.* at 22.

In January 1986 the FWS issued a regional "Land Protection Plan" (LPP) covering bottomland hardwoods in Texas and Oklahoma. A.R. Item C. The LPP stated that the FWS "propose[d] to identify the minimum level of protection necessary to preserve as much as possible of the remaining high quality bottomland habitat," and reviewed "a combination of alternative actions" to that end. *Id.* at 1-2. It projected a goal of preserving some 250,000 acres identified as important habitat in the two States, but did not speculate as to which sites would be protected. *Id.* at 5-6.

b. Section 16.051 of the Texas Water Code directs state agencies to prepare comprehensive water plans for the development and management of the State's water resources. Tex. Water Code Ann. § 16.051 (Vernon 1988). In 1984, the Texas Water Development Board published a revised Texas Water Plan (TWP) (A.R. Item H) setting forth water planning through 2030. The 1984 TWP mentioned four potential reservoirs along the Middle Sabine River, but none within the immediate area of the Club's property. The TWP projected a surplus of water in the Sabine Basin through 2030. A.R. Item H, Vol. II, at III-5-11, III-5-15 & Fig. III-5-3.

In March-April 1985, petitioner Sabine River Authority (SRA) issued a report (A.R. Item N) extending its own "master plan" through 2030. The report included a summary of preliminary design studies for a "totally new project" to build a Waters Bluff Reservoir that would, if constructed, inundate the Club's property. *Id.* at 10-1 *et seq.* In March 1986, SRA completed a preliminary feasibility study on Waters Bluff (A.R. Item M),

which recommended continued efforts to proceed with the project subject to cost and other possible (including environmental) constraints. *Id.* at 14-2, 9-8.

c. From 1982 through 1986 the FWS, the Texas Parks and Wildlife Department, the Club and others (including petitioner SRA) had discussed protection of waterfowl habitat on the Club's prime bottomland property along the Sabine River. Gov't C.A. Br. 10-11 & n.17. On August 29, 1986, the Club offered to donate a nondevelopment easement on the property to the United States for inclusion within the National Wildlife Refuge System. *Ibid.*

Faced with a proposed acquisition, on September 8, 1986, the FWS issued for comment a draft environmental assessment (A.R. Item P), tentatively concluding that no EIS was required under NEPA because the acceptance would not significantly affect the quality of the human environment. After public hearings and receipt and consideration of comments, in December 1986 the FWS issued a final environmental assessment (EA) and FONSI (A.R. Item D) and accepted the easement.

The EA discussed the potential impact of the proposed acquisition upon future water supplies, addressed SRA's preliminary plans concerning the Waters Bluff Reservoir and evaluated alternative proposals. It concluded both that elimination of the Waters Bluff site would not seriously impair the availability of water supplies for the foreseeable future and that establishing a waterfowl refuge in conjunction with the proposed Waters Bluff project was not a desirable alternative to accepting the easement. A.R. Item D, at 11-17, 20-21. It emphasized that acceptance of the easement would preserve, rather than altering or allowing future alteration of, the area's environmental characteristics. *Id.* at 44-46.

3. a. Petitioner SRA brought suit challenging the FWS's decision to accept the donated easement without

first preparing an EIS. Petitioner Texas Water Conservation Association (TWCA) intervened as a plaintiff, supporting SRA's arguments and also alleging that FWS was required to prepare an EIS with respect to the overall bottomlands preservation "program" outlined in the Concept Plan and the LPP.

The district court granted summary judgment for the defendants. The court ruled that SRA and TWCA lacked standing to maintain their NEPA claims (SRA Pet. App. 39a, 40a, 53a). The court also addressed the merits, however, and on the basis of the administrative record upheld the FONSI that accompanied the final EA. The court held that the FWS had taken an appropriately "hard look" at the environmental consequences of its actions and adequately considered the information before it, *id.* at 40a-49a, and that NEPA did not require the FWS to give further consideration to the harms alleged by petitioners (the inability to develop the Club site as a reservoir and the risk of future water shortages) because they did not follow from any "changes in the physical environment cause[d]" by the FWS's action. *Id.* at 33a.

The court likewise rejected (SRA Pet. App. 50a-52a) TWCA's claim that the preservation "program" set out in the Concept Plan required an EIS. The court found that the Concept Plan was a study and planning document, without "effects" that could be meaningfully evaluated, and thus did not constitute a "proposal" for major federal action subject to NEPA. *Id.* at 52a.

b. The court of appeals reversed the district court's decision on standing (SRA Pet. App. 7a-13a), but otherwise upheld and generally adopted (*id.* at 3a) the district court's rulings and opinion on the merits. Citing the district court's "painstaking review of the agency record" (*id.* at 19a), the court agreed that the FWS's decision not to prepare a full EIS was not arbitrary or capricious.

The court held (*id.* at 20a-22a) that preservation of the Club property would cause no physical change in the environment, and thus would have no significant environmental impact of the sort with which NEPA is concerned.

ARGUMENT

1. As the court of appeals recognized, judicial review of an agency's finding of no significant impact (*i.e.*, its determination that an EIS is not required with respect to a proposed action) is highly deferential. SRA Pet. App. 15a-18a and cases there cited; see *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-378 & n.23 (1989). Whether the exact standard is the "arbitrary and capricious" standard applied by the court of appeals, SRA Pet. App. 16a, or the "reasonableness" standard applied by the district court, SRA Pet. App. 27a, is unimportant in this case. This Court has recognized that the difference generally "is not of great pragmatic consequence." 490 U.S. at 377 n.23. Moreover, the court of appeals explicitly held (SRA Pet. App. 17a n.2) that it would have affirmed the district court's decision even under the more demanding standard.

The district court carefully reviewed (SRA Pet. App. 40a-49a) the procedural and substantive adequacy of the FWS's environmental assessment of accepting the Club easement. It concluded that while petitioners might disagree with the FWS's decision, there was "no indication that the FWS failed to consider pertinent data in reaching its conclusion," that its review was inadequate, or that its decision was unreasonable, arbitrary or capricious.[1] *Id.* at 42a. Acknowledging the district court's

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[1] Petitioner TWCA suggests (TWCA Pet. 30) that FWS "ignored" the comments of the various federal and state agencies which expressed water supply concerns when FWS circulated the draft EA for comments. As the district court noted (SRA Pet.

"painstaking review of the agency record," the court of appeals agreed. *Id.* at 19a. Thus, two federal courts have reviewed the FWS's administrative findings and upheld its decision on the particular facts of record under a proper and essentially undisputed legal standard. The question does not merit further review.

2. Petitioner SRA's assertion (SRA Pet. 6) that the decision "creates an unprecedented blanket exemption from NEPA's mandate" is unfounded. This Court has held that NEPA does not require an EIS to address possible consequences of agency actions unless there is "a reasonably close causal relationship" between the alleged harm and a "change in the physical environment" caused by the agency action. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).[2] SRA is correct (SRA Pet. 18-21) that under NEPA an agency must take account of unexpected but potential physical environmental changes (*i.e.*, environmental risks) flowing directly from its actions, such as the risk of an accident incidental to operating a nuclear power plant, 460 U.S. at 775 & n.9, but no such risk has ever been identified in this case. The risk that SRA and TWCA complain of—potential future water shortages—

App. 44a-45a), however, the FWS considered those comments and subsequently revised and expanded the final EA with a responsive discussion of the water supply situation, including the Waters Bluff project.

[2] In its attempt to distinguish *Metropolitan Edison* (SRA Pet. 14-18), SRA appears to argue that that decision somehow requires a connection between the effect of an agency action and the physical environment, without requiring a connection between the federal action and a physical environmental change. Even if this were logically possible, the Court's opinion states clearly that NEPA "was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment" and "addresses environmental effects of federal actions." 460 U.S. at 772, 778.

would arise not from the FWS's action in accepting the preservation easement, but from completely exogenous factors (such as population increases or changes in the uses of surrounding land) and the potential inability of other authorities to take a particular action they might otherwise have taken at some point in the future.[3] See SRA Pet. App. 33a-34a. Importation of such factors into the analysis "lengthens the causal chain beyond the reach of NEPA." 460 U.S. at 775.

The courts of appeals have consistently held that NEPA does not require preparation of an EIS when an agency's action does not result in any change to the physical environment as it exists at the time of the action. *E.g.*, *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1001-1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980) (lease of existing parking lot to new manager); *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1098-1099 (5th Cir. 1981) (replacement of bridge destroyed by hurricane); *Upper Snake River Chapter of Trout Unlimited* v. *Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (significant adjustment of dam flow rate as part of normal management); *Burbank Anti-Noise Group* v. *Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981) (financial assistance to purchase existing airport).[4] Applying this principle to the facts,

[3] Where, as here, the agency's action merely maintains the environmental status quo, the ability of Congress (if not of local authorities) to address any conflicting needs that actually arise in the future is of course preserved. See SRA Pet. App. 36a; A.R. Item D, at 46, 53.

[4] Cases such as *Lockhart* v. *Kenops*, 927 F.2d 1028, 1032-1033 (8th Cir.), cert. denied, 112 S. Ct. 186 (1991) (see SRA Pet. 16 & n.10, TWCA Pet. 47 & n.15), holding that particular title transfers required preparation of an EIS, are not to the contrary. As the court of appeals pointed out (SRA Pet. App. 21a), such cases involve situations where, unlike here, title is transferred in contemplation of physical changes to the land. The cases cited by

the courts below correctly concluded (SRA Pet. App. 21a-22a, 32a-35a) that the FWS's acquisition of a preservation easement the very purpose of which was to *prevent* changes in the environmental status quo was not the sort of action that NEPA was intended to reach.

SRA contends (SRA Pet. 7-9) that the decision below conflicts with the principle of statutory neutrality enunciated by *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Contrary to SRA's suggestion (SRA Pet. 8), however, the court of appeals did not conclude that no EIS was required because FWS's action "as a whole [was] environmentally beneficial" or import into NEPA a blanket exception for agency actions in furtherance of "preservation interests." The court merely applied the established rule that no EIS is required where the federal action in question will not affect the existing physical environment. The court of appeals expressly noted that NEPA "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after tak-

petitioner TWCA (*e.g.*, TWCA Pet. 48-49, 58-59) are similarly compatible with the status quo principle. *Forelaws on Board* v. *Johnson*, 743 F.2d 677, 681-682 (9th Cir. 1985), cert. denied, 478 U.S. 1004 (1986), for example, carefully contrasted the situation where discretionary agency decisions would affect future power needs and therefore the need for resource development (EIS required) with agency decisions merely allocating or reallocating an existing, fixed supply of power (no EIS required). *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), required an EIS where changes in allocation of water from existing reservoirs involved direct and undisputed physical environmental changes (reducing "return flow" of water to rivers). *Id.* at 851; see SRA Pet. App. 34a (district court opinion).

ing a 'hard look at environmental consequences.'" SRA Pet. App. 13a, quoting *Methow Valley*, 490 U.S. at 350.[5]

The FWS and the courts below agreed in applying settled legal principles to straightforward facts. They correctly concluded that "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.' NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is *not* built." SRA Pet. App. 19a-20a (citation omitted) (court of appeals), quoting TWCA Pet. App. A65-A66 (district court), quoting *National Ass'n of Property Owners* v. *United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), aff'd *sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982). That common sense conclusion requires no further review by this Court.

3. TWCA contends (TWCA Pet. 19-39) that the FWS was obligated to prepare a "programmatic" EIS in conjunction with the Concept Plan and the regional LPP. An EIS is required, however, only at "the time at which [the agency] makes a recommendation or report on a *proposal* for federal action." *Kleppe* v. *Sierra Club*, 427

[5] SRA's complaint (SRA Pet. 9-13) that the decision below will allow the FWS to proceed without consideration of water supply issues ignores the preliminary environmental assessment procedure. The EA prepared in this case considered (A.R. Item D, at 11-17) the potential impacts of the easement acquisition upon future water supplies and determined, as a factual matter, that acceptance of the easement would not have any significant impacts upon water supplies in the foreseeable future. Even if the easement would preclude the construction of a Waters Bluff Reservoir, the EA concluded (*id.* at 15-16) that foreseeable water supply demands could be readily satisfied from other existing and proposed reservoirs. The district court specifically found the EA's consideration of this question to be fully adequate. SRA Pet. App. 42a. The court of appeals endorsed (*id.* at 22a) the district court's finding.

U.S. at 406 (emphasis in original), quoting *Aberdeen & Rockfish R.R.*, 422 U.S. at 320. The Council on Environmental Quality's regulations state in relevant part that a "proposal"

> exists at that stage in the development of an action when an agency subject to [NEPA] has a goal *and is actively preparing to make a decision on one or more alternative means of accomplishing that goal* and the effects can be meaningfully evaluated.

40 C.F.R. 1508.23 (SRA Pet. App. 92a-93a) (emphasis added). Neither the Concept Plan nor the LPP met this definition.

The district court (SRA Pet. App. 50a) expressly applied Section 1508.23 and concluded that the Concept Plan did not constitute a "proposal." The court found (*ibid.*) that "a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future." The court then stated:

> The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. * * * Even after a concept plan is prepared, land acquisitions may be rejected after the FWS conducts further study and planning. It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements con-

tained in the Preservation Program Concept Plan support this conclusion.

SRA Pet. App. 51a (citations omitted).

TWCA disputes (TWCA Pet. 24-32) the district court's weighing of the evidence, but the court clearly had adequate grounds in the record for its finding that the Concept Plan did not constitute a "proposal" for the purposes of NEPA. Cf. *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3189-3191 (1990) (Bureau of Land Management's "land withdrawal review program" not sufficiently defined to be reviewable agency "action"). Moreover, even if the Concept Plan had constituted a "proposal," it would have been largely a proposal to acquire preservation easements of the sort at issue in this case, directed at preventing rather than causing or allowing changes in the physical environment. For the reasons discussed above, such a proposal would not have required an EIS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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